

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-1873

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
: UNITED STATES OF AMERICA,

Appellee, :

Docket No. 74-1873

-against-

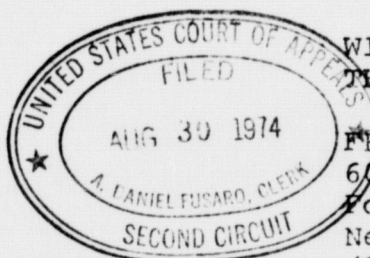
PETER MARROCCO, :

Appellant.
-----X

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APPENDIX FOR APPELLANT

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WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
606 United States Court House
Foley Square
New York, New York 10007
(212) 732-2771

WILLIAM EPSTEIN
Of Counsel

PAGINATION AS IN ORIGINAL COPY

74 CR 110

73CR 944

MISHLER,

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: AUSA R. DEL GROSS
vs.	for deft. MARROCCO:
✕ CHARLES SIENA	Louis Rosenthal
✕ FRANK CARDIA	16 Court St., Bklyn, NY
✕ PETER MARROCCO	855-2600
✕ GRACE CASSESE	for deft. CARDIA:
	Guy Parisi 858-8080
	32 Court St., BKLYN
	For Defendant: GRACE CASSESE:
	Michael Santangelo:
	253 Broadway, NYC. 267-448
	for deft. SIENA:
	Gerald Shargel
	522 Fifth Avenue, NYC.
	687-4100

Did conspire to distribute heroin, etc.

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		6-20-74	Notice of Appeal (no fee)		
Clerk,			deft Peter Marrocco		
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
2-13-74	Before Bartels J - Indictment filed.
2-19-74	Before MISHLER, CH J - case called - defts & counsels present - defts arraigned and each on his own behalf enters a plea of not guilty - bail conditions extended to this case from 73 CR 944. Motion to suppress, severance and discovery argued as to deft CASSESE - Decision Reserved - April 8, 1974 for trial. 4 Notices of Appearances f
2-20-74	Certificate of Engagement filed. for all defts.
3-5-74	By MISHLER, CH J - Memorandum of Decision and Order filed denying motion for severance (Grace Cassese)
3-5-74	By MISHLER, CH J - Memorandum of Decision and Order filed on motion for bill of Particulars etc. granted and denied as indicated in Order. (Grace Cassese)

74 CR 110

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
4-8-74	Before MISHLER, CH.J.- Case called- Defts and counsel present- Motion renewed by deft Cassese for a severance- motion denied- Deft Sienna withdraws his plea of not guilty to count 1 and after being advised of his rights by the court and on his own behalf enters a plea of guilty to count 1- Bail conditions contd- Motion by the govt to sever Deft Cassese is granted Trial ordered and begun as to deft's CARDIA AND MARROCCO-Jurors selected and sworn-Trial contd to 4-9-74 at 10:00 A.M.		
4-9-74	Before MISHLER, CH J - case called - defts CARDIA & MARROCCO present with counsels - trial resumed - Hearing on motion to suppress held - Motion to suppress denied - Hearing concluded - Govt rests -motion by defts to dismiss the indictment is denied - defts rest - defts renew their motion to dismiss the indictment - Motion denied - motion by deft to reopen their case is granted - trial contd to 4-10-74.		
4-10-74	Before MISHLER, CH J - case called - defts CARDIA & MARROCCO present with counsels - trial resumed - Cassette tape marked deft Cardia's Ex.A and is ordered sealed for possible review by the Court of Appeals. Deft rests - Govt rests - defts renew their motion to dismiss the indictment - motion denied - trial contd to 4-11-74 at 10:00 am .		
4-11-74	Before MISHLER, CH J - case called - defts CARDIA & MARROCCO present with counsels - trial resumed - at 11:30 am the Jury retired for deliberation - at 4:20 PM the jury returned and rendered a verdict of not guilty as to deft CARDIA & guilty on counts 1, 3, 4 & 5 as to deft MARROCCO - deft CARDIA discharged - motion reserved to time of sentence as to deft MARROCCO - Jury polled and discharged - sentence as to deft MARROCCO adjd without date - bail conditions contd as to deft MARROCCO.		
4-11-74	By MISHLER, CH J - Order of Sustenance filed (Lunch-16 persons)		
4-11-74	By MISHLER, CH J - Judgment of Acquittal filed (CARDIA)		
4-15-74	Deft Cardia's Exhibit A filed and ordered sealed by the court		
6-20-74	Before MISHLER, CH J - case called - defts SIENNA & MARROCCO present with attys - deft SIENNA sentenced to imprisonment on count one for a period of 6 years and special parole term of 10 years. defts motion for a 2 weeks stay to surrender is denied. On motion of Special Atty. counts 2 & 6 are dismissed. Deft MARROCCO sentenced to imprisonment for a period of 5 years on each of counts 1, 3, 4 & 5 and special parole term of 5 years - said sentences to run concurrently - clerk to file Notice of Appeal without fee. Bail conditions contd pending appeal.		
10-74	Judgment & Commitment filed for defts SIENNA & MARROCCO. Certified copies		

A 21000
 7/16/74
 R. L. Smith

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

-v-

CHARLES SIENA
FRANK CARDIA
PETER MARROCCO
GRACE CASSESE

Defendants
-----X

IN CLERK'S OFFICE
DISTRICT COURT E.D. N.Y.

SUPERSEDING
INDICTMENT

FEB 13 1974

★ 21 U.S.C. §§ 841 (a)(1), 846
18 U.S.C. § 2

TIME A.M.

P.M.

74CR 110

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between March, 1972, and the 20th day of September, 1973, both dates being approximate and inclusive, within the Eastern District of New York, the defendants Charles Siena, Frank Cardia, Peter Marrocco, and Grace Cassese, knowingly, intentionally and unlawfully did conspire, with each other and with Nicholas Marchese, named herein as a co-conspirator but not indicted, to distribute and to possess with intent to distribute quantities of heroin, a Schedule I narcotic drug controlled substance, and cocaine, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

[Title 21, United States Code, Section 846]

COUNT TWO

On or about March, 1972, within the Eastern District of New York, the defendants Charles Siena and Grace Cassese knowingly, intentionally, and unlawfully did distribute approximately one ounce of cocaine, a Schedule II narcotic drug controlled substance.

[Title 21, United States Code, Section 841(a)(1)]

[Title 18, United States Code, Section 2]

COUNT THREE

On or about the 27th day of July, 1973, within the Eastern District of New York, the defendant Peter Marrocco knowingly, intentionally and unlawfully did distribute approximately 5.01 grams of heroin, a Schedule I narcotic drug controlled substance.

[Title 21, United States Code, Section 841(a)(1)]

[Title 18, United States Code, Section 2]

COUNT FOUR

On or about the 6th day of August, 1973, within the Eastern District of New York, the defendant Peter Marrocco knowingly, intentionally, and unlawfully did distribute approximately 7.88 grams of heroin, a Schedule I narcotic drug controlled substance.

[Title 21, United States Code, Section 841(a)(1)]

[Title 18, United States Code, Section 2]

COUNT FIVE

On or about the 22nd day of August, 1973, within the Eastern District of New York, the defendants Peter Marrocco and Frank Cardia knowingly, intentionally and unlawfully did distribute approximately 15.87 grams of heroin, a Schedule I narcotic drug controlled substance.

[Title 21, United States Code, Section 841(a)(1)]

[Title 18, United States Code, Section 2]

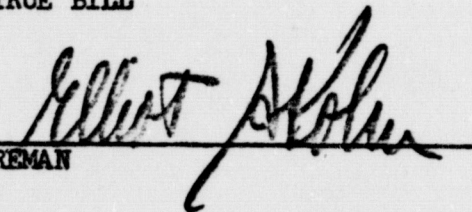
COUNT SIX

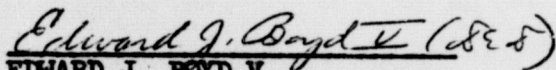
On or about the 20th day of September, 1973, within the Eastern District of New York, the defendant Charles Siena knowingly, intentionally, and unlawfully did distribute approximately 86.2 grams of heroin, a Schedule I narcotic drug controlled substance.

[Title 21, United States Code, Section 841(a)(1)]

[Title 18, United States Code, Section 2]

A TRUE BILL


FOREMAN


EDWARD J. BOYD V
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

Charge

(Jury entered jury box at 10:00 A.M.)

THE COURT: Madam Foreman and ladies
and gentlemen of the jury:

We have reached the point in the trial
where it becomes my duty to instruct you on
the applicable law. Before I go into the
law I would like to try to correct a few
misimpressions that you may have gotten.

First, distributed to you this morning,
was a form called "verdict." Actually, the
verdict is rendered when all the jurors agree
and the Foreman gives the verdict in open court.
This should more properly read "memorandum of
verdict" and we will come to this when I charge
you on the essential elements of the crime
charged in the indictment. This is really, only
a memorandum. You can write on it -- there's
nothing holy about this -- write on it, use it
for any purpose that you think will aid you in
arriving at the verdict.

I have always felt that where we have
more than one defendant and more than one charge,
that you should have before you a clear under-
standing of what each defendant is charged with

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2 in each of the counts. Each defendant is a
3 separate entity and each count must be con-
4 sidered separately so that in this case, the
5 indictment charging two defendants in count
6 one is like two separate trials.

7 In count three, the defendant, Peter
8 Marrocco, is charged alone. That is separate.
9 You must measure the evidence against the
10 count to see if the Government has proved its
11 case beyond a reasonable doubt.

12 Count four, is Peter Marrocco. It's a
13 different date. See if the Government proved
14 that the transaction took place as charged in
15 the indictment and so, in the last count, naming
16 both Peter Marrocco and Frank Cardia, each defen-
17 dant should be considered separately and so
18 you really have six trials in one. So, that's
19 one misstatement, to wit, "verdict" that I
20 wanted to clear up.

21 The other is concerning something the
22 Government said in summation and we have no
23 transcript so I can't recall it word for word
24 or read it to you, but substantially, this is
25 what Mr. Del Grosso said: "Frank says" --

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2 referring to the defendant, Cardia -- "'I
3 didn't do anything; not a thing. I just
4 gave him'" -- meaning the defendant, Marrocco --
5 "'Tommy's number. I gave Tommy's number to
6 Petey. What did I do? Nothing.'"

7 Now, that's about what he said in
8 summation. I don't think he intended to convey
9 to you, the idea, that he is recalling the
10 testimony of Mr. Cardia because both lawyers
11 agree -- all the lawyers agree that when Mr.
12 Cardia testified he did not say that he gave
13 Petey, the defendant Marrocco, Tommy Marchese's
14 telephone number. What Mr. Del Grosso was
15 doing, in effect, was conveying to you what he
16 understood the defendant Cardia's position in
17 the matter to be from all the evidence.

18 Again, we don't have a transcript of the
19 evidence but Mr. Del Grosso could properly come
20 before you and argue the evidence and state what
21 the evidence said or what, from the evidence,
22 Mr. Cardia's position was and in doing that he
23 can present it to you in any form he wishes.
24 So, it was proper for him to do it that way as
25 long as you understand that he was not saying this

Charge

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2 was Mr. Cardia's testimony because he agrees
3 that it was not.

4 So, that's another possible false impression
5 you may have gotten from his argument. I just
6 wanted to clear that up. Incidentally, you may
7 not have gotten that impression but I just want
8 to make sure you didn't.

9 In every criminal trial the defendant is
10 presumed to be innocent. In this case when I
11 charge you I will use "defendant" in the singular
12 but it will apply to both defendants -- unless
13 in a specific charge and I can only think of one
14 at this point, where I talk about testimony
15 being admissions made by Mr. Marrocco to Special
16 Agent Martin -- but unless I say "this only
17 applies to one defendant" it applies to both
18 defendants, even though I use the singular. I am
19 using it in the collective sense except when it
20 refers to only one defendant, as for example,
21 the charges in counts three and four, would refer
22 only to Mr. Marrocco. The point is, that every
23 defendant in every criminal trial is presumed to
24 be innocent and that means that the law requires
25 you to conclude that the defendant is innocent of

Charge

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1 every charge in the indictment. The defendant
2 has pled "not guilty" and upon that plea, the
3 law says that you conclude his innocence. You
4 conclude his innocence from the outset of the
5 trial and that presumption is maintained through-
6 out the trial and throughout your deliberations
7 and that presumption is enough to acquit the
8 defendant.
9

10 To put it in a slightly different context,
11 the question before you is not whether the defen-
12 dant is guilty or innocent. The question before
13 you is whether the Government has proved the
14 defendant guilty of the crime charged by proof
15 beyond a reasonable doubt.

16 We say the presumption of innocence alone
17 is enough to acquit the defendant. You heard
18 the term "Scotch Verdict." In Scotland there
19 are three verdicts; guilty, not guilty and
20 not proved. In this country we have two verdicts;
21 guilty and not guilty. Not guilty includes not
22 proved.

23 Now, what is the Government's burden?
24 The Government's burden is to prove the defendant
25 guilty of the crime charged beyond a reasonable

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doubt. The Government starts with that burden and it remains with the Government throughout the trial.

Proof beyond a reasonable doubt. What is a reasonable doubt? A reasonable doubt is a doubt based on reason and common sense and the state of the record; the evidence in the case as distinguished from a kind of vague or imaginary doubt or emotional doubt that is based on a disinclination to perform an unpleasant task, recognizing that finding a defendant guilty is an unpleasant task.

A reasonable doubt is not some speculative doubt. It is a doubt which a reasonable person has after weighing all the evidence.

A reasonable doubt is a kind of doubt that would make a reasonable person hesitate to act in a matter of importance to himself. Proof beyond a reasonable doubt is therefore, proof of such convincing character that you would be willing to rely and act upon it in the most important of your own affairs without hesitation.

The Government's burden is not to prove the defendant guilty of the crime charged beyond

Charge

all doubt. There is a qualifying word --
"beyond a reasonable doubt." The Government's
burden is not to prove that every bit of evidence
that was introduced at the trial is true beyond
a reasonable doubt. The Government's burden is
to prove all the essential elements of the crimes
charged beyond a reasonable doubt and I will
tell you what the essential elements of each
crime charged are.

The defendant need not prove his innocence.
He need not offer any proof at all. The defendant
has the right to rely on the failure of the Gov-
ernment to prove its case.

Now, what is evidence? Evidence is the
manner in which the law provides for proving or
disproving a disputed fact. There are two general
classifications of evidence; one, direct evidence
and the other, indirect or as it is sometimes
called, circumstantial evidence. There is no
mystery about the difference between the two types
of proof. Direct evidence is the testimony of a
witness as to what that witness saw or heard.
Circumstantial evidence is a procedure through
which the jury draws reasonable inferences from

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2 established facts based on common sense and
3 experience.

4 For example, assume you were sitting
5 here as a jury in a personal injury action and
6 the plaintiff, Mrs. Smith, was suing the defen-
7 dant, Mr. Jones, claiming that on a certain day
8 Mr. Jones negligently drove his motor vehicle,
9 struck her and knocked her down. Further assume
10 that Mrs. Smith claimed that the defendant was
11 driving at an excessive rate of speed and passed
12 a stop sign without stopping and let's further
13 assume that my courtroom deputy, Martin Adler
14 and myself were witnesses in the case and that
15 we were called to testify and the circumstances
16 that brought us into the courtroom were that on
17 the particular day in question, we happened to
18 be talking on the streetcorner of the intersecting
19 streets where the stop sign was located.

20 Now, if we further assume that he had his
21 back to the stop sign, his back to the roadway,
22 while I had my eyes on the stop sign and the
23 roadway and stop sign were directly in view, you
24 can understand that we would both be witnesses
25 but witnesses to different things.

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2 Now, the disputed fact is whether or
3 not Mr. Jones passed the stop sign without
4 stopping. Keep that in mind because you must
5 first identify the disputed fact.

6 If I were called to testify I would,
7 in effect, say, "Well, yes, I was speaking
8 with my courtroom deputy on a particular day
9 at the intersection" and I would talk about the
10 lighting conditions and general area and all the
11 other circumstances. I would say "As I was
12 speaking with Mr. Adler I saw Mr. Jones' 1973
13 white Cadillac drive down the street at about
14 65 miles an hour, pass the stop sign and I
15 saw it strike the plaintiff, Mrs. Smith."

16 Now, that's direct evidence of that
17 issue. I saw it, I came to the stand and testi-
18 fied that that is what happened.

19 Now, Mr. Adler did not see the motor
20 vehicle pass the stop sign but he is competent
21 to testify as to what he did see. So, in effect,
22 he would say, "Well, as I was talking to the Judge
23 my eyes turned slightly to my right and within
24 my peripheral vision I saw a 1973 Cadillac, later
25 identified as being driven by Mr. Jones, traveling

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at about 65 miles an hour and it passed behind me and I lost sight of it and as I turned to my left, again, in my peripheral vision, beyond the stop sign, I saw the motor vehicle strike and injure Mrs. Smith. How long did it take? How long was the motor vehicle out of view? Oh, about two or three seconds. How long a distance did it travel? Oh, about 150, 170 feet."

From the established facts, I think you would agree with me that the reasonable inference to be drawn, based on good common sense and experience is that Mr. Jones did not stop at the sign but traversed approximately 150 feet in two or three seconds.

So, you would draw a reasonable inference from Mr. Martin Adler's testimony that the motor vehicle passed the stop sign without stopping.

The law does not regard one type of evidence as being of better quality than the other. The law requires only that the Government prove the guilt of the defendant beyond a reasonable doubt, both on the direct and circumstantial evidence.

Charge

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2 I have used the term "presumption"
3 and I have used the term "inference."

4 A presumption is a conclusion which
5 the law requires the jury to make and which
6 prevails unless overcome by proof to the con-
7 trary, beyond a reasonable doubt and the pre-
8 sumption, of course, is the presumption of
9 innocence.

10 An inference is the conclusion which a
11 jury may make and the example there, of course,
12 is the method of proving disputed facts through
13 circumstantial evidence.

14 What is the evidence in this case? First,
15 the evidence in this case is the sworn testimony
16 of witnesses that appear in court before you.
17 Secondly, the exhibits that are marked in evidence
18 and thirdly, facts which have been stipulated to
19 between the attorneys and the only such fact that
20 I can recall is that if a chemist were called to
21 testify, he would testify that his opinion as
22 to what the substances were, as described in
23 his reports were true.

24 It may be of help to describe to you
25 what is not evidence in the case. Statements

made by lawyers in their opening, in summations, perhaps, even random statements that you may have heard, is not evidence. Opening statements and summation serve a very useful purpose. The opening statements in general outline, tells you something about the case so you may more easily understand the testimony that is to follow. Summations argue the evidence in the case so you may focus on the evidence that the lawyers believe is important to their particular positions. Theories of inculpability submitted to you by the Government, you may consider. You may think that they are reasonable. You may think about it. You may reject all or part. Theories of inculpability means theories of guilt, arguments that the defendants are guilty. Arguments made to you of exculpability, arguments asking for a not guilty verdict made by Mr. Rosenthal and Mr. Parisi, may appeal to you. They are arguing that the Government has not proved its case beyond a reasonable doubt. If they are attractive you may want to consider them. If you find them illogical, of course, you have the right to just reject them. But, the

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point is, they get the jury thinking about the evidence and that's what is important. But they are not evidence. Statements, if any, made by the Court, of course, are not evidence.

If on occasion I asked a question, it was not intended to give it special importance but was asked because at the time it occurred to me that the jury may have been confused about some issue in the case and I thought that a question might have clarified it. But don't place any special importance on any questions that the Court asked.

I have no opinion as to the guilt or innocence of either defendant on any charge. That is solely your function. You are the jury and you and you alone will make the fact determinations. You and you alone will decide what happened. You and you alone will decide factually, whether the Government proved a conspiracy, whether the Government proved, in each case, the charge against the defendant on the charge of the sales at the various times.

My function is just to charge you on the law but you must accept the law even though you

Charge

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2 may not like it, even though you may not agree
3 with it. You will learn soon that these charges
4 are based on the law commonly known as the
5 Drug Abuse and Control Act of 1970. Some of
6 you may personally feel that there should be
7 no law concerning the control of drugs of any
8 kind. You must lay those personal feelings
9 aside. Some of you may feel that the law is
10 not strict enough. You would be violating your
11 duty as jurors if you permitted your personal
12 attitudes to creep into the acceptability of
13 the law as I charge it to you. Just as I must
14 accept your fact findings as the sole judges
15 of the facts, so you must accept the law as I
16 charge it, as the sole judge of the law. That
17 is very important to a fair trial and applying
18 the law, as I charge it to the facts as you find
19 them, arriving at the verdict as to each charge
20 as against each defendant, of guilty or not guilty,
21 we will then have a fair trial and a fair verdict.

22 At times during the trial objection was
23 sustained to questions asked. You may not specu-
24 late on what the answer may have been if the
25 witnesses were permitted to answer. It is the

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2 same theory. The Court ruled as a matter of
3 law that it was not a proper question and so
4 it should not be in the record and you may
5 not consider it, you may not speculate on it.
6 The same theory applies to matters stricken
7 from the record. If I said "Strike it, jury
8 disregard it" it is stricken from the record
9 physically, and figuratively, from your mind
10 and you should not consider it. Again, the
11 theory being that you should decide this case
12 solely on the evidence admitted into the case
13 in accordance with the charge of the Court,
14 free of all bias, prejudice and sympathy, based
15 on fair inferences that you may draw, based on
16 good common sense and then, you shall have
17 performed your function well.

18 You, the jurors, are the sole judges of
19 the credibility of the witnesses which means
20 the believability of their testimony and the
21 weight their testimony deserves. Scrutinize
22 the testimony given and the circumstances under
23 which each witness testified and every matter
24 in evidence which tends to show whether the
25 witness is worthy of belief. Consider each

Charge

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2 witness' intelligence, the motive of each
3 witness and state of mind, the age of the
4 witnesses, their demeanor and manner while
5 on the witness stand. You judge the witness'
6 testimony on whether the witness answered fully
7 and directly. Did the witness attempt to evade
8 answering the question? You determine the wit-
9 ness' ability to observe and hear the matters
10 to which the witness has been called upon to
11 testify; whether the witness shall have im-
12 pressed you as having an accurate recollection
13 of those matters; the relation that each witness
14 has to the case; the relation each witness bears
15 to the litigants in the case; the manner in
16 which the witness might be affected by the
17 verdict; the extent to which, if at all, the
18 witness is contradicted or corroborated by other
19 testimony in the case. Use these tests and
20 guides. They are all common sense tests and
21 guides. You have all experienced them. You have
22 all tested credibility in your phases of business
23 and social life. Use them here. Those are the
24 tools to determine the truth because this really
25 is a search for the truth in determining what

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happened.

A defendant who wishes to testify is competent as a witness and when a defendant decides to take the witness stand he is to be judged by the same tests as any other witness is judged.

In this case the Government offered testimony through Special Agent Martin that upon arrest, the defendant, Peter Marrocco said that he had made two sales to him.

Now, testimony concerning an admission by a defendant outside of court and after a crime has been committed should always be considered with caution and weighed with great care and all the evidence of such admissions should be discarded entirely unless the evidence in the case convinces the jury beyond a reasonable doubt that the statment was knowingly and voluntarily and intentionally made.

A statement is knowingly, voluntarily and intentionally made if it is done when the party, the defendant, is aware of what he is saying and it is not knowingly and voluntarily and intentionally made if it is made through

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2 some mistake, misapprehension or other
3 innocent reason.

4 In determining whether the statement
5 was knowingly, voluntarily and intentionally
6 made, consider the age and intelligence and
7 mental condition of the defendant at the time
8 it was allegedly made and all the other circum-
9 stances and in this case it was allegedly made
10 while the defendant, Peter Marrocco was under
11 arrest and in custody. Of course, that is one
12 of the circumstances.

13 Determine whether the defendant was
14 advised of all his constitutional rights; that
15 he was told that he had a constitutional right
16 to remain silent; if he made a statement it
17 would be used against him; that he had the
18 right to counsel and if he could not afford
19 counsel the Court would appoint counsel for him;
20 that he had the right to counsel during the
21 interrogation; that at any time during the
22 interrogation, if he wished to stop the interro-
23 gation and ask for counsel, there was a duty to
24 stop the interrogation. The Government must
25 prove beyond a reasonable doubt that the

Charge

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1 constitutional rights were given and that
2 he was warned of the consequences of waiving
3 those rights and that he knowingly and intell-
4 igently waived those rights.
5

6 If the Government has failed to prove
7 beyond a reasonable doubt that those rights
8 were given and that the statements were knowingly,
9 voluntarily and intentionally made, disregard
10 the statements allegedly made by Mr. Marrocco
11 at the time of his arrest. However, if you
12 are satisfied that he made it, that it was a
13 free choice, that he said it knowingly and
14 voluntarily -- because you may use that as part
15 of the evidence that the Government has intro-
16 duced against the defendant Peter Marrocco --
17 if you find that the admissions were made by
18 Mr. Marrocco knowingly, voluntarily and inten-
19 tionally, it has nothing whatever to do with
20 the defendant Cardia. So, that is one clear
21 instance where you must judge this case
22 individually. The evidence as it is admitted
23 against each defendant must be segregated except
24 where it is chargeable against both and I will
25 give you such an instance where it is chargeable

1
2 against both soon, in the conspiracy count.

3
4 There are two theories of criminal
5 liability in this indictment. Count one con-
6 tains a conspiracy count. Counts three, four
7 and five are what we call substantive counts.
8 They are based on specific statutes while the
9 conspiracy count -- which in embarrassment I
10 tell you I do not have before me -- I have
11 the count, not the statute which is 18 U.S.C.
12 Section 371 and I like to read it verbatim,
13 although I have charged it so many times I
14 probably can charge it -- but, the difference
15 between the conspiracy count and substantive
16 counts is that there is a general statute under
17 what we call Title 18 Section 371, a section
18 that says where two or more persons conspire
19 to violate any statute or commit a fraud against
20 the United States and one of the conspirators
21 perform an overt act to further the objects
22 of the conspiracy, then that section is violated.
23 So, that is a broad statute that covers any
24 possible violation and the Congress has, in
25 effect, said that the crime is entering into
an understanding to commit an unlawful act --

not the act itself, but rather, the understanding.

Now that I have the statute -- I mis-spoke myself. There is another conspiracy statute. It is not the general conspiracy statute but 846 and now I know why I didn't bring 371 in. But it is the same idea, same concept except that the conspiracy statute says that any person who attempts or conspires to commit any offense defined in this subchapter violates that conspiracy statute. So again, the crime charged in count one is the understanding to go into a business, an illegal business and the illegal business that count one says they went into was to distribute and possess with intent to distribute heroin and cocaine and it refers back to another statute which is 21 United States Code Section 841(a)(1) and that statute says in part that it shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance.

So, the charge in counts three, four and five are what we call the substantive counts -- the sale of heroin, and count one, the conspiracy

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2 count, is the understanding or agreement to
3 in effect, go into the business of distributing
4 which, in effect, means selling or possessing
5 with intent to sell heroin or cocaine.

6 A conspiracy finds its analogy in a
7 legitimate partnership. If we think of a con-
8 spiracy as a partnership organized for unlawful
9 purposes, it may generally describe what a
10 conspiracy is. It is not a precise analogy
11 but it conveys the idea.

12 If one of you and myself were in a legiti-
13 mate business, let's assume in a grocery store,
14 and one of you were the man or woman behind the
15 counter, selling retail to the customers that
16 came in and I was your partner in the business
17 but I did the buying, if I went out in the market
18 and bought 500 cases of canned corn or peas the
19 partnership would be bound by that sale because
20 it is a purchase I made for the business, during
21 the business and to further the objects of the
22 business. You need merchandise to stay in
23 business. So, that's easy enough to see. You
24 would be bound by that even if you didn't think
25 I should have bought all that corn. Maybe you

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2 would have rather invested in peas or carrots
3 but the idea is, I had the authority and
4 bought it and you are bound by it. So, part-
5 ners are bound by what other partners do, even
6 if all the partners are not present when it
7 happens. The test is, was it during the term
8 of the partnership for the purposes of the
9 partnership and it doesn't matter that you
10 were not present when I purchased the corn
11 and so it is in a criminal enterprise.

12 Once the conspiracy is established by
13 proof beyond a reasonable doubt and the proof
14 is that one of the conspirators acted or made
15 declarations or said something or did something
16 during the term of the conspiracy and in further-
17 ance of the objectives of the conspiracy, then
18 any other person proven to have knowingly and
19 wilfully entered into the conspiracy by proof
20 beyond a reasonable doubt is bound by those
21 acts and declarations even though he wasn't
22 aware of what was being said or done.

23 Now, I tried to recall some of the testi-
24 mony that would serve as an example and only
25 serve as an example. I don't say what was said

1 by Mr. Marchese on the stand was true. I
2 don't say it is false. I say, it is none
3 of my business. However, it is your business
4 and so when I quote the testimony it isn't
5 intended in any way to give it any substance
6 but I recall that -- and maybe incorrectly
7 because my recollection isn't any better than
8 yours and you may recall it differently and
9 your recollection is what counts -- but I
10 think Mr. Marchese testified that on August
11 2, 1973 Marrocco told him that Siena told
12 Cardia to beware of Martin because he, Siena,
13 suspected that Martin was a police officer.
14

15 Now, if you believe Mr. Marchese's
16 testimony, then in order to bind Mr. Cardia,
17 you would have to find that the Government
18 proved beyond a reasonable doubt that the
19 conspiracy charged in the indictment was estab-
20 lished for the purposes set forth in the indict-
21 ment and that Marrocco was a member of that
22 conspiracy.

23 The testimony of Mr. Marchese, as to what
24 Mr. Marrocco said, if believed, may be considered
25 by you because he says that it is a statement of

1 Mr. Marrocco. But only Mr. Marrocco is
2 responsible for what he says. He cannot bind
3 Mr. Cardia unless -- and here is the exception --
4 unless the conspiracy is established as I just
5 said, and you find that Mr. Marrocco knowingly
6 and wilfully entered into that conspiracy --
7 and I will define what "knowingly" and
8 "wilfully" is -- and unless Mr. Cardia is shown
9 to be, by proof beyond a reasonable doubt, also
10 a member of that conspiracy and then, just as
11 in the legitimate partnership I just described,
12 what Mr. Marrocco said binds Mr. Cardia if you
13 find that it was during the term of the con-
14 spiracy and for the objectives of the conspiracy.

15
16 If you find the Government has failed to
17 prove all that, then of course, you may not
18 charge it against Mr. Cardia. In our system
19 of law, except for the exception that I just
20 charged you on, an individual is responsible
21 for only what he says and does. So, if you
22 believe Mr. Marchese then that is testimony
23 against Mr. Marrocco and again, that testimony
24 is chargeable only against Mr. Cardia if all
25 those conditions are established beyond a

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2 reasonable doubt.

3 I will give you those principles in
4 summary. Acts or declarations do not bind a
5 person not present unless and until the Govern-
6 ment proves beyond a reasonable doubt; one,
7 that the conspiracy alleged in the indictment
8 has been established which means that the
9 Government has proved that there was a conspir-
10 acy and the purpose of the conspiracy; two,
11 that the party who made the declaration has
12 knowingly and wilfully entered into the con-
13 spiracy; three, that the act or declaration was
14 made during the term of the conspiracy and in
15 furtherance of the objectives of the conspiracy
16 and four, that the party to be charged knowingly
17 and wilfully entered into the conspiracy. If all
18 that is not proven it may not be charged against
19 a person not present, not participating in the
20 act or declaration.

21 Now, coming back to the nature of the
22 conspiracy, the gist of the offense is a combination
23 or agreement or understanding to disobey or dis-
24 regard the law -- in this case, an understanding
25 to deal in heroin. The indictment charges heroin

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2 and cocaine but I will come to that. For
3 the moment, to deal in heroin.

4 Now, similarity of conduct between the
5 defendants, the fact that Mr. Marrocco and
6 Mr. Cardia were friends, they went out together,
7 went crabbing together, they saw each other,
8 does not necessarily establish proof of the
9 existence of a conspiracy. However, the
10 evidence in the case need not show that any
11 formal or express agreement existed to go into
12 the business. What the evidence in the case
13 must show beyond a reasonable doubt in order to
14 establish the charge that a conspiracy existed,
15 that the members in some way or manner or through
16 some contrivance, positively or tacitly came to
17 a mutual understanding to try to accomplish a
18 common and unlawful plan. In other words, it
19 need not be formally expressed. The Government
20 need not prove that everyone understood every-
21 thing about the conspiracy and each one knew
22 every member of the conspiracy but just that
23 those charged had a tacit understanding that they
24 were in an unlawful business and that they were
25 ready to perform their part in the unlawful

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2 business. The evidence need not show that
3 all the methods charged in the indictment
4 were carried out.

5 Now, at this point I charge you that
6 the Government failed to prove that the con-
7 spiracy was organized to deal in cocaine.
8 There is some evidence, if believed, that
9 would indicate that there was a transaction
10 where Mr. Marchese purchased some cocaine from
11 Mr. Siena. Now, in my opinion, that isn't
12 enough to establish that the understanding
13 was to deal in cocaine. That is not to say
14 that I have found that it was organized for
15 heroin because again, that is a matter solely
16 for you but I charge you, as a matter of law,
17 that that objective is not sustained by any
18 proof. However, the Government need not prove
19 that every method or objective of the conspiracy
20 was carried out or used. The Government need not
21 prove that everyone that they charged to be a
22 member of the conspiracy was in fact a member of
23 the conspiracy. The evidence in the case must
24 establish beyond a reasonable doubt that the
25 alleged conspiracy was knowingly formed; that

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2 one or more of the means or methods described
3 in the indictment was agreed upon to be used
4 in an effort to effectuate or accomplish the
5 object of the conspiracy -- in this case, to
6 deal in heroin -- and that two or more persons,
7 including one or more of the accused knowingly
8 and wilfully became members of that conspiracy.
9

10 In order for the jury to find that a defen-
11 dant became a member of the conspiracy it must
12 be on testimony by witnesses and here, the only
13 witnesses who testified as to the activity of
14 the defendants were Mr. Marchese and the sur-
15 veilling agents and Special Agent Martin, who
16 acted in an undercover capacity. So, it is
17 the testimony of what those witnesses saw these
18 defendants do, or heard what these defendants
19 said.

20 The Government must establish beyond a
21 reasonable doubt in order to prove that a defen-
22 dant knowingly and wilfully entered into a
23 conspiracy, that the defendant was aware of what
24 the purpose of the conspiracy was and that it
25 was unlawful to deal in heroin and entered into
the conspiracy or understanding or partnership,

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2 knowing that it was unlawful to deal in
3 heroin. In other words, that it was a
4 knowing and voluntary choice and that is
5 what we mean by describing the essential
6 element of knowingly and wilfully entering
7 into a conspiracy.

8 In order for the Government to prove
9 the conspiracy charge. in other words, to
10 sustain its burden of proving the defendant
11 guilty on the conspiracy count, the Government
12 must prove; one, that the conspiracy alleged
13 in the indictment existed for the purposes set
14 forth and during the term alleged; two, that
15 the defendant knowingly and wilfully entered
16 into the conspiracy; three, that thereafter,
17 one of the conspirators knowingly performed an
18 overt act in furtherance of the objectives of
19 the conspiracy.

20 An overt act is any statement, negotia-
21 tions -- it can be as innocent as a telephone
22 call -- knowingly made by one of the conspira-
23 tors to talk about, to further the purpose which
24 was the sale of narcotics. A sale itself, of
25 heroin, is an overt act or you may consider it

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as a type of overt act in furtherance of the objectives of the conspiracy.

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To come to the counts in the indictment, count one charges that on or about and between March, 1972 and the 20th day of September, 1973, both dates being approximate and inclusive, within the Eastern District of New York, the defendants Frank Cardia, Peter Marrocco, and also mentioned are Charles Siena and Grace Cassese, who you learned were severed from that count, knowingly and intentionally and unlawfully conspired with each other and with Nicholas Marchese, named herein as a co-conspirator but not indicted, to distribute and to possess with intent to distribute quantities of heroin, a Schedule I narcotic drug controlled substance, and cocaine, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), citing Title 21, United States Code, Section 846.

Now, most of federal law is codified. It is in books and under titles. The charge in the indictment upon which the statute is

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2 based is known as Title 21 United States Code
3 Section 846. It is part of the Drug Abuse
4 and Control Act of 1970. The Congress enacted
5 legislation in which it sought to strictly con-
6 trol all narcotic drugs; control the importa-
7 tion, the manufacture, the possession, the
8 sale, the distribution of all narcotic drugs.

9 One of the sections of the Drug Abuse
10 and Control Act of 1970 established schedules.
11 Section 812 -- and I'm citing this really only
12 for the record because I know you will forget
13 the number as soon as I say it -- Section 812
14 defines Schedule I as, the drug or other substance
15 has a high potential for abuse; the drug or
16 other substance has no currently accepted
17 medical use in treatment in the United States;
18 there is a lack of accepted safety for use of
19 the drug or other substance under medical super-
20 vision and other Schedule I(b) it says "Any of
21 the following opium derivatives, their salts,
22 isomers, and salts of isomers whenever the
23 existence of such salts, isomers, and salts of
24 isomers is possible within the specific chemical
25 designation" and under subdivision (10) is

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2 "heroin" and I charge you that heroin hydro-
3 chloride is a Schedule I narcotic drug.

4 Now, in the control of schedule narcotic
5 drugs the Congress enacted a subparagraph known
6 as Section 841(a)(1) which in part says, "It
7 shall be unlawful for any person knowingly or
8 intentionally to manufacture, distribute, or
9 dispense, or possess with intent to manufacture,
10 distribute or dispense, a controlled substance."
11 As I say, heroin is a controlled substance. So,
12 the Congress said it is a crime to distribute
13 heroin and that means to sell it. It is a crime
14 to possess with intent to distribute heroin and
15 then it further said, as I have said repeatedly, in
16 Section 846, it is a crime to conspire to distribute or
17 possess with intent to distribute heroin.

18 Now, I have already charged you on the
19 essential elements on the conspiracy charge which
20 is count one and which is listed on the memorandum
21 of verdict which is described as a "verdict" and
22 again, on the memorandum, when you use it after
23 you go over all the evidence, you decide whether
24 the Government has established beyond a reasonable
25 doubt first, whether Frank Cardia is guilty or not

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2 guilty and then, whether Peter Marrocco is
3 guilty or not guilty.

4 On the other three counts, counts three,
5 four and five, these are the counts where the
6 indictment charges a sale.

7 Count three -- neither defendant is
8 charged in count two -- count three charges that
9 on or about July 27, 1973, in the Eastern
10 District of New York, the defendant Peter Marrocco
11 knowingly, intentionally and unlawfully did
12 distribute approximately 5.01 grams of heroin, a
13 Schedule I narcotic drug controlled substance.

14 Count four charges that on or about August
15 6, 1973, in the Eastern District of New York, the
16 defendant Peter Marrocco knowingly, intentionally
17 and unlawfully did distribute approximately 7.88
18 grams of heroin, a Schedule I narcotic drug
19 controlled substance.

20 Count five charges that on or about
21 August 22, 1973, within the Eastern District of
22 New York, the defendants Peter Marrocco and Frank
23 Cardia knowingly, intentionally and unlawfully
24 did distribute approximately 15.87 grams of
25 heroin, a Schedule I narcotic drug controlled

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substance.

Now, in each one of those counts the Government must prove beyond a reasonable doubt that the defendant distributed heroin on or about the dates set forth in each count; two, that in the distribution, the sale, the defendant did knowingly and intentionally sell. In other words, that the act was performed with criminal intent; that the defendant knew that it was heroin and knew that it was a violation of law to sell heroin; in other words, that it was a voluntary choice.

In count three, the Government must prove beyond a reasonable doubt that Peter Marrocco knowingly and intentionally distributed about 5 grams of heroin on July 27, 1973.

In count four the Government must prove beyond a reasonable doubt that Peter Marrocco knowingly and intentionally distributed about 7.88 grams of heroin on August 6, 1973.

In count five, the Government must prove beyond a reasonable doubt that Frank Cardia and Peter Marrocco knowingly and intentionally distributed approximately 15.87 grams of heroin on

August 22, 1973.

The Government need not prove that a defendant committed every act in the crime charged. We have what we call an aiding and abetting statute. If a defendant aids, abets, counsels, encourages the commission of a crime, then that defendant is guilty as a principal. If one knowingly participates in a crime and wilfully participates in a crime and helps bring it about then he is guilty as if he himself committed the crime.

Now, you will shortly be excused from the courtroom for purposes of deliberating on the matter before you. It is your obligation to go over the evidence in the case. Each juror must decide the case for himself and herself.

Each juror has the obligation of discussing the evidence with his or her fellow jurors. It is a violation of your duty to refuse to talk to the other jurors about the evidence in the case. It is a violation to refuse to discuss your tentative verdict or your feelings or determinations in the matter. It is improper for any juror to come into the jury room with a

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2 fixed opinion as to the guilt or innocence of
3 the defendants as to any charge and refuse to
4 talk about the evidence. It is just as improper
5 for any juror to abandon his obligation and say
6 in effect "Whatever the rest of you say is
7 all right with me. I'll go along with it."
8 This is a deliberative process which involves
9 sifting the evidence, talking about it logically
10 and drawing fair and reasonable inferences.

11 Your objective is to try to arrive at a
12 unanimous verdict, after discussing the evidence
13 and your determination should be based on the
14 evidence.

15 If during your deliberations one of you
16 arrives at a tentative determination and reasonable
17 arguments are presented to you that would indicate
18 that you were wrong in the first place, you have
19 an obligation to re-consider your tentative
20 determination; go over the evidence in the case,
21 and if, based on the evidence, you can, in good
22 conscience, abandon your determination previously
23 arrived at -- as I say, based on the evidence --
24 then it is your obligation to do so. In other
25 words, you must be reasonable and sensible in

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2 looking at the evidence and in your mental
3 processes in arriving at a determination.

4 During your deliberations you may have
5 occasion to communicate with the Court. You
6 communicate through your Foreman.

7 If you want any of the testimony read
8 back to you I will ask the reporter to locate
9 the subject matter or the witness' testimony
10 you want re-read and it will be re-read to
11 you. You will be called back into the courtroom.
12 That will take some time because we don't have
13 a transcript in this case so try to be specific
14 if you can in advising me as to what testimony
15 you want read back.

16 During your deliberations you may have
17 voted on particular counts in the indictment.
18 You may have arrived at a unanimous verdict as
19 to one or more counts. If you wish to report
20 one or more counts, you may do so. If you
21 wish to wait until you have arrived at a
22 verdict on all counts, that is your decision,
23 but don't tell me, during your deliberations,
24 how you stand as to a particular count. Don't
25 tell me you are 6 to 6 or 8 to 4 or 5 to 7;

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2 just tell me when you have arrived at a
3 unanimous verdict.

4 If you will take leave of the Court,
5 I will call you back in a few moments.

6 Don't start discussing the case yet.

7 (Jury excused)

8 THE COURT: MR. Del Grosso?

9 MR. DEL GROSSO: I have a request.
10 I don't believe you instructed them as to
11 "knowingly" and "intentionally."

12 THE COURT: I didn't instruct them on
13 what "knowingly" and "intentionally" was?
14 I remember instructing them specifically on
15 "knowingly" a number of times when I talked
16 about the admissions and I said that the
17 Government would have to prove that it was
18 intentionally done -- a voluntary act. If
19 I didn't I'd like to say it.

20 MR. DEL GROSSO: It could be my mistake,
21 your Honor.

22 THE COURT: Well, it may not have been
23 done at the time I gave the essential elements
24 but if there is any question about it I'll do
25 it again.

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2 MR. ROSENTHAL: I didn't ask for this
3 before but I would like you to charge that a
4 co-conspirator's testimony should be con-
5 sidered with caution.

6 THE COURT: An accomplice's testimony.

7 MR. ROSENTHAL: Right -- Marchese's
8 testimony.

9 THE COURT: Yes.

10 MR. ROSENTHAL: And on the conspiracy
11 verdict, one of your last remarks to the jury
12 was that if they reach a verdict on one count
13 they can report it to you.

14 I feel that may encourage them to reach
15 a quick verdict on one count and go back and
16 deliberate and I prefer they do not do that
17 unless they were a hung jury on one count.

18 THE COURT: No. I will leave that
19 to them.

20 I didn't charge on accomplice testimony,
21 you are perfectly right about that and though
22 I told them originally, that an indictment is
23 not proof of a charge but merely an accusation,
24 I think I will tell them that again.

25 Seat the jury.

(Jury entered jury box at 11:20 A.M.)

THE COURT: I should have charged you on how to treat Mr. Marchese's testimony.

Mr. Marchese is described as an accomplice. He says that he participated in the crime charged. Now, of course, that is his characterization of the activity and that statement in no way is chargeable against the defendants but when he says that he is an accomplice then you must receive his testimony with caution and weigh it with great care.

An accomplice's testimony, by reason of its very nature, should be looked at carefully. You should look at his motive for testifying. You determine whether it is a motive for telling the truth or a motive for lying. You determine what benefit he would get out of testifying and what benefit or hopes he has in testifying for the Government; whether those motives would indicate a reason for telling the truth or a reason for lying.

Now, a witness is not incompetent to testify because he participated in the trial and because he is an accomplice. As a matter of fact,

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2 You may find the defendant guilty on the
3 accomplice's testimony alone if you find that
4 testimony to be true, beyond a reasonable
5 doubt. So, the defendant may be convicted on
6 the uncorroborated testimony of an accomplice
7 if you believe the accomplice's testimony to
8 be true beyond a reasonable doubt.

9 However, again, look at the entire case,
10 weigh Mr. Marchese's credibility and again, in
11 considering his testimony, understand that he
12 comes to the witness stand as an accomplice
13 and you must examine his testimony carefully
14 and weigh it with great care.

15 Now, I referred to the indictment and I
16 remind you again that the defendants have pled
17 not guilty to each and every charge against them.
18 You may not use the indictment as proof of the
19 allegations of the indictment. The indictment
20 is only the means by which the law brings a
21 defendant to court to answer the charges and
22 lastly, if I haven't stated it clearly before,
23 I want to state it clearly now: In every crime
24 charged there are two parts; first, what we
25 call the proscribed act, the proscribed conduct

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and then, the criminal intent.

In the conspiracy count the statute says that "Any person who attempts or conspires to commit any offense defined in this subchapter" -- and one of the subchapters is 841, and that says "It shall be unlawful for any person knowingly or intentionally" -- so that the Government must prove a state of mind. So that, as to the conduct -- "Don't go into any business of selling drugs" -- the Government must prove that the defendant knowingly and wilfully went into this deal being aware of what he was doing, knowing it was unlawful to deal in heroin and that it was a violation of law to do it.

On the substantive charge in counts three, four and five, in making the sale, the Government must prove that the defendant was aware of what he was doing, that it was not through mistake or inadvertence but a voluntary act, a choice of his and that he intentionally did it. In other words, it was not an oversight or error but rather, that he knew what he was doing when he sold the drugs and that he intended to do just that -- to sell heroin and that he knew it was

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the substance.

Now, at this point, I will excuse alternates number one and two. Only twelve jurors may deliberate on the matter. If you have any personal affects in the jury room please get them.

We have ordered lunch for you and at twelve o'clock if you call my chambers your lunch will be delivered to you but you are excused now with the thanks of the Court.

THE CLERK: Go down to the central jury room.

THE COURT: Please take your outer clothing.

(Alternate jurors one and two excused)

THE COURT: Please swear in the marshal.

(United States Deputy Marshal Richard B. Armstrong was duly sworn by the Clerk of the Court at 11:30 A.M.)

THE COURT: Now, I will give the Foreman an extra copy of the verdict and just to make sure you remember it is a memorandum of verdict, I will write it in. I will just

Certificate of Service

August 30 , 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

William Epstein